United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-6174

Affidavit

To be Argued by
PAUL H. SILVERMAN

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76-6174

CLARYCE K. GREENE,

Plaintiff-Appellant,

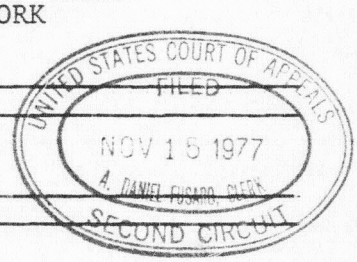
- v -

COMMISSIONER OF INTERNAL REVENUE,

Defendant-Appellee.

B
P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



BRIEF OF DEFENDANT-APPELLEE

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United States Attorney for the
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08-3353

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PHS:sr
69-0275
08-3353

Table of Contents

PHS:jj
69-0275
08-3353

Table of Authorities

Table of Authorities (Cont'd) -2-

8-3353

UNITED STATES COURT OF APPEALS

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Issues Presented for Review

1. Should this appeal be dismissed for lack of jurisdiction?

2. Did the District Court properly dismiss this tax refund action after a bench trial at which the plaintiff-taxpayer failed to submit any evidence to support her complaint?

3. Did the District Court properly accord this plaintiff pro se her procedural right to due process by scheduling and compelling plaintiff to submit her evidentiary case at a bench trial six years after the action was commenced?

Preliminary Statement

(a) Proceedings in the District Court

Claryce K. Greene, pro se, plaintiff-appellant, professes to appeal from an order of the District Court, filed July 29, 1976, denying her motion to vacate the order of the District Court, filed July 20, 1976, which dismissed one of her post-trial motions for reconsideration.

Mrs. Greene commenced this action by filing a complaint on October 14, 1969, seeking relief in the form of damages, declaratory and injunctive relief and a refund of individual federal income taxes alleged paid for the tax year periods 1959, 1962, 1963, 1964, 1966, and 1967.

By an Order entered May 27, 1970 (Hon. Irving Ben Cooper, United States District Judge), the Court dismissed plaintiff's request for declaratory and injunctive relief. As to Claryce Greene's claims for refund, the Court found that she had apparently satisfied jurisdictional prerequisites only for the tax year periods 1959 and 1962, to the extent of $360.00 and $509.63, respectively. By an Order entered February 1, 1971, Judge Cooper denied Claryce Greene's "Motion for a More Definite Statement".

By an Order entered November 8, 1971, endorsement dated October 6, 1971 (Hon. Dudley B. Bonsal, United States District Judge), the Court dismissed Claryce Greene's claim as to all years other than 1959 and 1962, denied her motion to include a claim for damages and to vacate the the notices of deficiency and assessment for the years 1959 and 1962, granted her motion to amend and supplement her complaint to add the allegations of erroneous assessments for the years 1959 and 1962, and to increase the amount of the refund demand for the year 1962 from $509.63 to $827.85. The Court denied her motion for summary judgment for failure to satisfy her burden of proof. Her motion for reargument was denied by an Order dated November 18, 1971.

As a result of the above stated orders of Judge Cooper and Judge Bonsal, the only issues remaining for disposition concerned whether Claryce Greene had a right to a refund of taxes with respect to the taxable years 1959 and 1962, in amounts of $360.00 and $827.85, respectively.

PHS:sr
69-0275
8-3353

In January, 1974 this case was assigned to a Magistrate for pre-trial purposes. After Mrs. Greene had opposed the Magistrate's direction to file a pre-trial memorandum and objected to a trial or oral argument on her claims, the Court (Hon Charles E. Stewart), on May 20, 1974, ordered Mrs. Greene to submit all papers in her behalf by September 20, 1974 at which time the Court would consider whether it was necessary to have oral argument to resolve the matter.

Only after the Court, by letter dated January 28, 1975, advised Mrs. Greene of possible sanctions for her failure to appear at a pre-trial conference did she appear before the Court. At the scheduled February 27, 1975 pre-trial conference, Mrs. Greene agreed with the Court that there were material factual issues to be tried and a firm trial date was then set for March 6, 1975.

The trial was held on March 6, 1975 before the Hon. Charles E. Stewart. Mrs. Greene was her own sole witness. She testified only to the propriety of prior Court rulings which had barred all tax years claims except 1959 and 1962. The Court, on her behalf, placed into evidence correspondence she presented at the trial. These letters dealt with tax years other than 1959 and 1962. Although Mrs. Greene had not developed a prima facie case, as an assistance to the Court and as a courtesy to the pro se plaintiff, the Government called Revenue Agent Tryforos as a witness. The Revenue Agent testified, having been

assigned the matter of taxpayer Claryce Greene during the period 1960 to 1968, to the details supporting a proper assessment concerning tax year periods 1959 and 1962, including administrative hearings with Mrs. Greene. Mrs Greene cross-examined the Revenue Agent exclusively in connection with tax years not involved with the trial. At the conclusion of the trial, the Court directed Mrs. Greene to submit to the Court, in the next several days, any further documents she might have in support of her position: which she did.

At trial and thereafter by submission of documents directly to the Court, Mrs. Greene was extended full opportunity to present evidence to support her claim for refund. By memorandum decision, filed July 14, 1975, the Court found that Mrs. Greene had produced no relevant evidence at trial and that subsequent to trial she had furnished the Court with documentary material which in no way supported her claim to various tax deductions. The Court therefore found that Mrs. Greene had failed to prove her refund claim and dismissed her action. No appeal was taken.

On August 6, 1975 Mrs. Greene moved for reconsideration. By an endorsement filed September 30, 1975, the Court denied her reconsideration on the basis that she had provided the Court with no further evidence bearing upon her claims for tax refunds. On October 28, 1975, Mrs. Greene then moved for an order to vacate the Court's opinion dismissing the complaint and the Court's endorsement denying

reconsideration. This motion was denied by a memorandum decision filed on July 20, 1976. The basis of the denial was that the Court had no new facts or information to support a modification of its prior decisions.

(b) Proceedings in the Appellate Court

In brief, on November 25, 1975 Mrs. Greene filed a notice of appeal from the order of the District Court, dated September 29, 1975, dealing with her motion for reconsideration. This appeal was dismissed for lack of prosecution by the Clerk of the Court on June 8, 1976. On October 27, 1976 Mrs. Greene filed a motion for reinstatement of the appeal, which was denied by order entered February 24, 1977.

On October 27, 1976 Mrs. Greene filed a notice of appeal from the order of the District Court, dated July 20, 1976, dealing with her second motion for reconsideration. This appeal was dismissed for lack of prosecution by the Clerk of the Court on April 5, 1977. On April 14, 1977, Mrs. Greene filed a motion for reinstatement of this appeal, which was granted by order filed April 26, 1977 on the express condition that "Appellant's brief and appendix is served and filed by May 2, 1977; if appellant fails to do so by that date, the appeal will be dismissed and no further motions for reinstatement will be entertained." The appellant's brief and appendix were not served and filed by May 2, 1977. On May 3, 1977, Mrs. Greene filed

"Petition of Appellant for reconsideration by Submission Only"; on June 2, 1977 Mrs. Greene filed a "Petition for Reversal of Premature and False Verdicts", and in August, 1977 Mrs. Greene served a "Petition for Reversal of Premature and False Verdicts and Further Request for the Granting of Summary Judgment."

ARGUMENT

POINT I

THE APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION BECAUSE THE APPELLANT HAS FAILED TO FILE TIMELY HER NOTICE AND TO PROTECT HER APPEAL

The Federal Rules of Appellate Procedure state that civil appellants are granted sixty days from the date of the entry of the judgment or order appealed from to file a notice of appeal when the United States is a party to the litigation. Fed. R. App. P. 4(a). Timely filing of a notice of appeal is jurisdictional. United States v. Isabella, 251 F.2d 223, 225 (2d Cir. 1958). Upon a failure to so file, the complaint should be dismissed for lack of appellate jurisdiction. Graddy v. Bonsal, 375 F.2d 764 (2d Cir. 1967); Guido v. Ball, 367 F.2d 883 (2d Cir. 1966).

With respect to the two appeals taken in this action, Mrs. Greene has failed to timely file a notice of appeal and to perfect her appeal. On November 25, 1975,

plaintiff filed a notice of appeal addressed to the Court order, entered on September 30, 1975, denying her post-judgment motion for reconsideration based on alleged new facts. This appeal was dismissed for lack of prosecution, by order dated June 8, 1976. On October 27, 1977 Mrs. Greene again filed a notice of appeal; this time from the order of the District Court dated July 20, 1976, denying her second post-judgment motion based on alleged new facts. This second notice of appeal was filed more than sixty days from the date of the entry of the order appealed from and this Court lacks jurisdiction over this appeal. The order of the District Court dismissing her complaint after a bench trial was filed on July 14, 1975. She did not appeal from that order. Thus, it is respectfully submitted that it is only the appeal taken from the July 20, 1976 District Court order denying the motion for reconsideration, made pursuant to Fed. R. Civ. P.60(b), with which this Court need be concerned.

As set forth above, the notice of appeal from the July 20, 1976 District Court order was filed on October 27, 1976. The scheduling order, filed on November 12, 1976, directed Mrs. Greene to file her brief and

appendix by January 17, 1977. She did not file her brief and appendix by January 17, 1977. On January 18, 1977, Mrs. Green filed a motion for extension of time to file her brief and appendix. By order entered January 26, the Court granted her an extention of time to file the appellant's brief and appendix by February 18, 1977. Mrs. Greene did not file her brief and appendix by February 18, 1977. Despite such Court ordered extension, as after the first filed notice of appeal, Mrs. Greene again failed to file a brief and appendix so that this second appeal was also dismissed by the Clerk of the Court for failure to comply with the scheduling order, by order dated April 5, 1977. On April 14, 1977 Mrs. Greene again moved to reinstate, which was granted on condition, by order dated April 26, 1977.

Even after this appeal was reinstated on the sole condition that she file her brief and appendix by May 2, 1977, Mrs. Greene did not file her brief and appendix to date. Rather she filed papers on May 3, 1977, which stated that, in fact, they were not the appellant's brief, that this Court was unreasonable as to the amount of time granted in its order by extending her time to file her papers, and, that in spite of the Court's order to the contrary, Mrs. Greene intended to file only a portion of what she described as her brief only after another one month delay.

PHS:sr
69-0275
8-3353

On June 6, 1977 Mrs. Greene filed papers entitled a "Petition," and stated therein that she intended to divide her appeal in two segments, said "Petition" to comprise the first segment. In papers entitled "Petition" filed on August 5, 1977, notwithstanding the Court's April 26 order of conditional reinstatement. Mrs. Greene once more asserted her intention that the June 2, 1977 papers constitute only the first segment of her appeal. It appears fair comment that Mrs. Greene's actions reflect her intention to appeal in a piecemeal fashion. In addition, by her own words and acts, Mrs. Greene has informed this Court that she does not intend to abide by its rule and orders.

Further evidence that Mrs. Greene does not intend to be bound by the rules of the Court can be located in her notice of appeal and in her "petitions" wherein she purports to be appealing from the District Court's July 20, 1976 Order denying her motion for relief from judgment and from the District Court's July 14, 1975 Order which Mrs. Greene sought to attack in her Rule 60(b) motion. While she may appeal from the denial of her motion for relief from judgment, she may not, nearly two years later,

attack the original Order of dismissal. This Court, in Daily Mirror v. New York Daily News, 533 F.2d 53, 56 (2d Cir.), cert. denied, 429 U.S. 862 (1976), set forth the limits of an appeal from the denial of a motion for relief from judgment:

> An order denying relief under Rule 60(b) is an appealable order, but the appeal brings up only the correctness of the order itself. Hines v. Seabord Air Line R.R. Co., 341 F.2d 229 (2d Cir. 1965) Wagner v. United States, 316 F.2d 871 (2d Cir. 1963). It does not permit the appeallant to attack the underlying judgment for error that could have been complained of on direct appeal. Sampson v. Radio Corp. of America, 434 F.2d 315, 317 (2d Cir. 1970); 9 J. Moore, Federal Practice ¶204.12[1] [2d ed. 1973].

Id. See also Pagan v. American Airlines, 534 F.2d 990, 992-93 (1st Cir. 1976).

Courts have been generally flexible with respect to the adherence by pro se litigants to judicial rules. See United States v. Sander, 434 F.2d 219 (4th Cir. 1970). However, such leniency is in all likelihood born of the courts' realization that, generally, such litigants may not be well versed in judicial procedure. It is evident from her own admissions that Mrs. Greene was cognizant of the Court's order and chose not to comply with it. In this respect, Mrs. Greene's actions were not rendered through ignorance

but were intentional violations of an order of the Court and in disregard of its rules. Chief Judge Kaufman stated at the beginning of his opinion in Gilliard v. Oswald, Dkt. No. 76-2109, slip op. (2d Cir., June 17, 1977):

> The future effectiveness of over-burdened federal courts depends in large measure upon wise allocation of judicial energy.

Clearly, the frivolous nature of Mrs. Greene's appeals and her deliberate indifference to judicial procedures have resulted in an unnecessary expenditure of the court's energy. Appeals have been dismissed even for unintentional non-compliance with court rules. See Harrelson v. Lewis, 418 F.2d 246 (4th Cir. 1969). Hargraves v. Bowden, 217 F.2d 839 (9th Cir. 1954). Upon the present facts of this case, this court should do no less.

This appeal should be dismissed because it is not timely and because Mrs. Greene has not complied with the orders of this Court regarding the filing of her brief.

POINT II

THE DISTRICT COURT PROPERLY ORDERED THE COMPLAINT DISMISSED BECAUSE AT TRIAL PLAINTIFF FAILED TO PROVE HER CASE

In a tax refund suit it has long been recognized that the taxpayer must show not only that the assessment made against him was erroneous, but also must establish the exact amount of the tax due. F.g., Lewis v. Reynolds, 284 U.S. 281 (1932); United States v. Drescher, 179 F.2d 863 (2d Cir. 1950). Otherwise, the taxpayer is not entitled to recover anything. Helvering v. Taylor, 293 U.S. 507, 514-15 (1935), aff'g Taylor v. Commissioner, 70 F.2d 619 (2d Cir. 1934). Indeed, because the action is one for restitution (for money had and received), and equitable in nature, it has been held that "a plaintiff must show that good conscience requires the refund." Zeeman v. United States, 395 F.2d 861, 865 (2d Cir. 1968). See also Larchfield Corp. v. United States, 373 F.2d 159, 164 (2d Cir. 1966). As succinctly stated by the Court of Claims (which has joint jurisdiction with the District Courts over tax refund suits, 28 U.S.C. § 1346(a)(1)),

> ... the taxpayer has the burden of proving the exact dollar amount to which he is entitled. See Helvering v. Taylor, 293 U.S. 507, 155 S.Ct. 287, 79 L.Ed. 623 (1935). This of necessity puts in issue every credit or deduction found in the particular tax return for which refund is sought or in a related tax return. Missouri Pacific Railroad Co. v. United States, 338 F.2d 668, 671 (Ct. Claims 1964) (footnote omitted)

See DeLorenzo v. United States, Dkt. No. 76-6153, slip op. (2d Cir., May 6, 1977); Lessor v. United States, 368 F.2d 306 (2d Cir. 1966). With these principles in mind, the inquiry of the Court below was properly focused on a relatively narrow question: what amount of tax did the plaintiff establish by a preponderance of credible evidence to have been overpaid? It is respectfully submitted that the taxpayer failed to affirmatively prove that she was entitled to any refund. Thus, the District Court properly entered a judgment declaring the "complaint dismissed."

From a reading of the trial transcript it is painfully obvious that taxpayer presented no evidence whatsoever to support her complaint. There could be but one resolution of this matter. The Court did exactly what it was obligated to do under circumstances in which the taxpayer-plaintiff, although having notice of the scheduled trial, produced no evidence at trial and subsequent to the trial furnished the court with material she alleged supported her claims but which the Court found "in no way supports her claim to various deductions." Order of the District Court, July 14, 1975. See Cataldo et. al., v. United States, 73-2 U.S.T.C. ¶9585 (S.D.N.Y. 1973), aff'd, 501 F.2d 396 (2d Cir. 1974).

PHS:sr
69-0275
8-3353

POINT III

THE DISTRICT COURT AFFORDED PLAINTIFF PRO SE A FAIR TRIAL

The substantive dispute in this refund suit focused on claimed deductions which were disallowed by the Internal Revenue Service in making its deficiency assessment. With respect to all of these disallowed deductions, "the taxpayer in every instance has the burden of justifying the allowance of any deduction claimed "4A Mertens, Law of Federal Income Taxation §25.03 at 10. [1972 Rev.], See, also, Deputy v. DuPont, 308 U.S. 488, 493 (1940); White v. United States, 305 U.S. 281, 292 (1938); Huene v. United States, 247 F. Supp. 564 (S.D.N.Y. 1965). In order to prevail the taxpayer must demonstrate facts which justify and substantiate a deduction. Clearly, the complaint of the plaintiff-taxpayer cannot be demonstrated in the absence of a factual presentation.

Mrs. Greene appeals from the denial of the District Court of her attempt to avoid a trial in this action. However, a trial is not only of value but absolutely necessary where there is a genuine issue as to any material fact. George C. Frey Ready Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., Dkt. No. 75-7698, Slip. Op. (2d Cir. May 6, 1977), and cases cited therein. Where, as here, the validity of plaintiff's

disallowed deductions are in dispute, a trial must take place. The dispute between the taxpayer and the Government basically focused on facts and was not a dispute of legal principles. See Cross v. United States, 336 F.2d 431, 433 (2d Cir. 1964); Six v. United States, 300 F.Supp. 277 (S.D.N.Y. 1969); Saunders v. Higgins, 29 F. Supp. 326 (S.D.N.Y. 1939).

The trial transcript, the District opinion following the trial, and District Court docket sheet reflect that only after the Court afforded both sides ample opportunity, and only after the taxpayer availed herself of this opportunity, to submit evidence that could in any manner support either party's position, did the Court enter its post-trial decision of July 14, 1975, finding no evidence in support of plaintiff's refund claims.

The many charges made in Mrs. Greene's papers against the Court, the Government counsel, and the Internal Revenue Service relating to the conduct of the trial are either trivial, intemporate, or not worthy of comment. A reading of the trial transcript and the decisions of the Court below throughout the action compels the conclusion that the taxpayer was afforded more than ample opportunity to present evidence in her behalf, and to argue and to reargue the law.

The taxpayer failed to prevail in the District Court not because of any lack of opportunity to be heard, but because she did not come forward with any proof to

PHS:sr
69-0275
8-3353

sustain her claim. This case has dragged through the District Court for six years and the Court of Appeals for two years. The plaintiff had her "day in court" and then some. The District Court made every effort to accommodate the pro se plaintiff. Litigation must have an end point.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed.

Dated: New York, New York
September , 1977

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America.

PAUL H. SILVERMAN,
PATRICK H. BARTH,
Assistant United States Attorneys,
-Of Counsel-

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 29th day of September 19 77 s he served two copies of the within Brief of Defendant-Appellee

by placing the same in a properly postpaid franked envelope addressed:

Claryce K. Greene
Box 1464 FDR Station
New York, New York 10022

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this

29th day of September ,19 77

Pauline P. Troia

PAULINE P. TROIA
Notary Public, State of New York
No. 31-4692381
Qualified in New York County
Commission Expires March 30, 1978